JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW

RESPONSE TO QUESTIONNAIRE ISSUED BY THE EUROPEAN COMMISSION IN CONNECTION WITH ITS REVIEW OF THE CURRENT REGIME FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS

January 2009

The views expressed herein are presented jointly on behalf of these Sections only. These Comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

INTRODUCTION

The Section of Antitrust Law and the Section of International Law of the American Bar Association (the "Sections") respectfully submit these comments in response to the questionnaire issued by the European Commission (the "Commission") in connection with its public consultation on the current rules for the assessment of horizontal cooperation agreements (the "Rules"), *i.e.*:

- Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements ("Specialization BER");[1]
- Commission Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements ("R&D BER");[2] and
- Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements ("Horizontal Guidelines").[3]

[1] OJ L 304, December 5, 2000, p. 3.

[2] OJ L 304, December 5, 2000, p. 7.

The Sections appreciate this opportunity to comment on their experience with the application of the Commission's Rules. At the outset, the Sections wish to make clear that they appreciate and welcome the goal of the Rules to promote an analytical framework for horizontal agreements grounded in the economic analysis of market power. This approach promises to provide business needed flexibility to fashion cooperative agreements within the framework of the EC competition rules. In this sense, the Rules offer the potential for landmark reform that, among other things, moves in the direction of greater harmonization or convergence between the U.S. and EU competition laws. The convergence of competition law on the basis of sound economic principles remains an important objective to enable effective oversight of competitive markets in times of economic challenge. The Rules are also significant because they recognize the practical requirements for business to cooperate in a market place increasingly characterized by globalization and associated market dynamics.

These comments address selected areas in which we believe potential opportunities exist for the Commission to rationalize its enforcement policies and promote the consistent application of Article 81 EC by revisions to the Rules and expanding their scope. The comments further note certain areas in which greater clarification and simplification of the Rules could enhance the Commission's enforcement objectives by offering guidance that will eliminate current uncertainties for business as to the applicable rules of conduct. In this regard, we point in particular to the important subject of information exchanges on which we recommend that the Commission undertake further consideration and analysis before issuing any guidance, as contemplated under Question 4 of the Commission's questionnaire.

[3] OJ C 3, January 6, 2001, p. 2.

These Comments expand upon the Sections' comments submitted in 2000 on the Commission's draft rules on horizontal cooperation agreements.[4] The Sections hope that these Comments will provide a helpful perspective based on experience both with U.S. antitrust laws and competition laws in the EU, its Member States and other competition regimes. The Sections would be pleased to provide any additional comments, or to participate in further consultation, as appropriate.

EXECUTIVE SUMMARY

I. Research And Development Agreements

Article 3(3) of the R&D BER, by limiting the right of exploitation, has the effect of disincentivizing firms from entering into pro-competitive R&D; accordingly, the Sections' view is that the Commission should consider removing these limits. Moreover, Article 4(1) of the R&D BER, by effectively requiring the parties to dissolve successful R&D ventures, creates potential disincentives to forming these types of ventures; in this regard, the Sections believe that the fruits of R&D ventures be subject to a block exemption as the product of a continuing "cooperation between non-competitors."[5]

II. Production And Specialization Agreements

The Sections believe that some clarification of technical issues in the Specialization BER would be beneficial, in particular, regarding the issue of whether supply agreements are exempt when products are supplied by one party to another party where that party's capacity is fully utilized; the ambiguity concerning the permissibility of stand-alone joint distribution agreements as a form of specialization agreement; addressing whether parties to a production

[4] Comments of the American Bar Association's Section of Antitrust Law on the European Commission's Draft Rules On Horizontal Cooperation Agreements (June 2000).

[5] See p. 5 below.

agreement ought to be allowed to set production levels for the relevant products where they do not form a production joint venture; and allowing the exemption provided by Articles 6(2) and (3) to continue to apply where the parties' combined market share falls below 20% within the relevant exemption periods.[6]

III. Purchasing Agreements

The Sections believe that the treatment of purchasing agreements should be, as with other types of agreements, governed by economic principles – specifically, whether the agreement in question gives rise to monopsony concerns – rather than being determined based on the size of the firms involved, as is currently the case. Accordingly, subject to substantive competition law concerns, the ability to enter into purchasing agreements should not be limited to SMEs. To the extent that the Commission believes exemptions or safe harbor thresholds for SMEs are appropriate, these should be specifically set out.[7]

IV. Commercialization Agreements

As commercialization agreements raise considerations regarding whether the restraints in question are justifiable as ancillary restraints, the Sections believe that it would be helpful for the Commission to provide guidance regarding its approach to this issue.[8]

V. Agreements on Standards

The primary issues raised by the Sections in relation to the Commission's approach to standard setting include the need for additional guidance regarding the Commission's view as to the circumstances in which standard-setting can result in harm to competition; and

[6] See p. 8 below.
[7] See p. 10 below.
[8] See p. 13 below.

concerns regarding the Commissioner's analytical approach to standards agreements, particularly with respect to third party access.[9]

VI. Environmental Agreements

The Sections believe that horizontal cooperation agreements should be assessed based on their potential economic and competitive impact – from a competition law perspective, agreements between competitors relating to the environment should be treated by the Commission in the same manner as would any other agreement. In the Sections' view, the advancement of social welfare objectives is the prerogative of legislators and not competition authorities.[10]

VII. Information Exchanges

While the Sections acknowledge that it is difficult to develop rules of general application with respect to information exchanges, it is clear that legitimate information exchanges can be pro-competitive and efficiency-enhancing. The Sections encourage the Commission to clarify the application of the effects based test in this area.[11]

COMMENTS

I. Research And Development Agreements

The Sections generally commend the Commission for the R&D BER's recognition that research and development ("R&D") agreements make positive contributions in the great majority of circumstances and in only relatively isolated circumstances could give rise to competitive concerns. The Sections, however, have comments regarding Article 3(3) and 4(1) of the R&D BER.

[9] See p. 15 below.
[10] See p. 21 below.
[11] See p. 23 below.

A. Access To And Right Of Exploitation

The Sections believe that Article 3(3) of the R&D BER has inhibited, and will continue to inhibit, the development of R&D agreements because it limits the right of exploitation "*to one or more technical fields of application, where the parties are not competing undertakings at the time the research and development agreement is entered into.*" Article 3(3) of the R&D BER implicitly recognizes that exclusive access rights can be beneficial, and, in fact, they can eliminate disincentives for parties to participate in R&D agreements. Given the market share thresholds that limit the R&D BER's availability, as well as the prohibition in Article 5(1)(a) of the R&D BER restricting the freedom of the parties to conducting independent R&D, the Sections believe that Article 3(3) of the R&D BER should be modified so that it no longer restricts the degree to which parties may limit the right of exploitation and recommend elimination of the quoted language in any future regulation on this point.

Additionally, the Sections are concerned that Article 3(3) of the R&D BER is ambiguous in its scope, because it can be interpreted to provide that each party must be free independently to exploit any pre-existing know-how of the parties necessary for the exploitation of the results of the joint research and development, even if that party neither contributed to, nor used, the pre-existing know-how in the R&D effort. The Sections believe any future regulation relating to horizontal R&D agreements should clarify that access to pre-existing know-how is limited to know-how contributed to the joint project unless otherwise agreed by the parties.

B. Duration

The Sections believe that Article 4(1) of the R&D BER unnecessarily introduces uncertainty into the continued viability of a R&D venture that has delivered substantial

benefits. Article 4(1) of the R&D BER provides, in effect, that two parties that do not compete but who jointly develop and then exploit the product of their joint R&D lose the benefit of the block exemption for the joint R&D if they are successful in marketing their products for seven years. In essence, however, these parties have acted as a single firm for purposes of the R&D and their mere continuation of that venture should not be treated as agreement between horizontal competing parties. Article 4(1) of the R&D BER effectively requires non-competing parties to a joint R&D project to plan for the eventual dissolution of the venture if it is successful. In this regard, Article 4(1) of the R&D BER detracts from the long-term value of R&D agreements and imposes potential costs: thereby creating disincentives that may discourage their formation in the first instance. The Sections suggest that any future block exemption regulation treat the R&D as the product of a continuing "cooperation between non-competitors" as described in ¶ 56 of the Horizontal Guidelines and thus the block exemption would continue to apply without limitation.

C. Safe Harbor Threshold

The Sections submit that the 25% threshold of Article 4(2) and (3) of the R&D BER is too low, given that a share of this magnitude generally will not give rise to substantive competition law concerns.[12] Supporting this view is the approach taken by other enforcement agencies. For example, under the Canadian Competition Bureau's bulletin "Strategic Alliances Under the Competition Act" ("Canadian Guidelines"), the Competition Bureau's approach is to treat collaborations between firms in accordance with the relevant criminal conspiracy, abuse of dominance and merger provisions of the Competition Act ("Canadian Competition Act"). The Competition Bureau's Merger Enforcement Guidelines state that mergers in which the merged firm will have a post-merger market share of 35% or less and

[12] The Sections understand that the R&D BER and the Specialization BER, discussed below, would not apply to naked restraints of trade, but only to collaborations that involve some degree of integration.

the market share held by the four largest firms in the relevant market is less than 65% do not raise concerns regarding unilateral or coordinated effects.[13] Similarly, the Canadian Guidelines on the Enforcement of the Abuse of Dominance Provisions state that, as a rule, conduct by firms with less than a 35% share of the relevant market will not generally give rise to concerns with respect to single firm conduct and that joint abuse of dominance concerns will generally not arise where the firms acting jointly have a market share of less than 60%.[14] Finally, unlike the US *per se* approach, under the Canadian Competition Act, agreements between competitiors will not come within the criminal conspiracy provision unless the conduct prevents or lessens competition "unduly."[15]

II. Production And Specialization Agreements

The Sections support the goal of the Specialization BER and are not aware of major issues in relation to its practical applications. The Sections, however, submit that the Commission consider clarifying the technical issues addressed below.

First, for unilateral specialization agreements, Article 1(1)(a) of the Specialization BER is unclear as to whether the exemption is limited to agreements between two parties. This is unclear, in particular, if Article 1(1)(a) is read in conjunction with Article 1(1)(b), which explicitly relates to "two or more parties." The Sections recommend greater consistency between the wording of these two definitions, also in relation to the general condition set forth in Article 1(1), first sentence, of the Specialization BER.

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[13] Canadian Merger Enforcement Guidelines, section 4.12.

[14] Canadian Enforcement Guidelines on the Enforcement of the Abuse of Dominance Provisions, p. 2.

[15] The *Competition Act*, R.S.C. 1985, c. 19, subsection 45(c). The current Canadian Federal Government has indicated that it will advance legislative reforms to create a two-track approach to agreements between competitors thaqt would make conspiracies (*i.e*. ov ert price-fixing) subject to a *per se* provision, while legitimate agreements between competitors would be subject to some form of rule of reason analysis.

Second, reciprocal specialization agreements benefit from the exemption if the parties agree to purchase and supply the discontinued products between them (Article 1(1)(b) of the Specialization BER). Such supply arrangements may be unlimited in time, and they may be exclusive (Article 3(a) of the Specialization BER). Supply agreements should be able to benefit from the exemption also where one of the parties agrees to supply the products concerned only where the capacity of the other party is fully utilized, and the Sections suggest that the Commission provide for this situation in its revised guidelines.

Third, Article 3(b) of the Specialization BER gives rise to ambiguity, as it allows joint distribution only in the context of production agreements but does not (at least not explicitly) address the issue of joint distribution as far as pure specialization agreements are concerned. This fact does not necessarily imply that the parties to specialization agreements cannot agree on joint distribution, given that the block exemption regulations currently in force no longer enumerate all contractual provisions that are permissible from an antitrust perspective. However, other than the R&D BER (Article 2 No 11), the Specialization BER does not provide criteria for "joint distribution." The Sections submit that the Commission consider allowing parties to specialization agreements to undertake joint distribution even if they do not form a production venture.

Fourth, Article 5(2)(a) of the Specialization BER allows a joint determination of the amount of the products to be produced pursuant to a specialization agreement and the joint setting of production and capacity volume pursuant to a production agreement by a production joint venture. If the parties agree on joint production but do not form a production joint venture, it would appear that all output agreements would be illegal pursuant to Article 5(1) of the Specialization BER. The Sections submit that the parties to a production agreement should be allowed to jointly fix their production levels for the relevant products produced even if their agreement does not include the formation of a production joint venture.

The Sections submit that there are no economic reasons for a stricter treatment of the joint venture in this respect. This approach also makes sense given that the Specialization BER neither defines nor otherwise contains any criteria for a "production joint venture" in the sense of Article 5(2)(a) of the Specialization BER.

Fifth, Article 6(2) of the Specialization BER provides for a two-year continued exemption if the parties' combined market share does not initially exceed 20% but subsequently increases to levels between 20% and 25%. Article 6(3) of the Specialization BER provides for a one-year continued exemption if the parties' combined market share does not initially exceed 20% but subsequently increases above 25%. The Sections submit that the original exemption should continue to apply if the parties' combined market share falls back below 20% within the one-year and two year periods, respectively. The Sections understand that the goal of the Specialization BER is to exempt specialization and production agreements with market shares below 20%, given that such arrangements pose no risk to competition within the meaning of Article 81 EC.

III. Purchasing Agreements

A. Treatment Of Small- And Medium-Sized Enterprises

Paragraph 116 of the Horizontal Guidelines recognizes that purchasing agreements between small and medium-sized enterprises ("SMEs") are normally procompetitive. This recognition appears to imply that purchasing agreements involving larger firms would not benefit from this presumption. However, the Horizontal Guidelines (and the examples at ¶¶ 135-38) set forth an analytical framework for the review of purchasing agreements that focuses not on the absolute size of a business but rather on its size relative to other businesses operating in the same market.

The Sections believe that ¶ 116 can benefit from some clarification to remedy this inconsistency. For instance, is a purchasing agreement by SMEs that accounts for a substantial share of the relevant purchasing market less problematic than a situation in which two large firms have a similar share of the relevant purchasing market? The answer should be in the negative, and the Sections suggest that the criteria for evaluating purchasing agreements, regardless of the size of the participating firms, be expressly set out in the Horizontal Guidelines. If the Commission were to conclude that purchasing agreements between SMEs were entitled to special consideration or safe harbor, the criteria for exemption under Article 81(3) EC should be made explicit.

B. Interplay With Rules On Vertical Restraints

The Horizontal Guidelines note at ¶¶ 117-18 that purchasing agreements may involve vertical restraints that must be analyzed in light of Commission Regulation (EC) No 2790/1999 of December 22, 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical BER")[16] and the Commission's Guidelines on Vertical Restraints ("Vertical Guidelines").[17] The interplay of the Horizontal Guidelines and the EC's rules regarding vertical restraints may give rise to issues in relation to purchasing agreements that have both horizontal and vertical aspects, and the Sections recommend that the Commission consider providing some clarification with regard to this issue, as well as appropriate coordination between the Horizontal and Vertical Guidelines.

For example, according to Article 4(e) of the Vertical BER, the block exemption does not apply to agreements between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-

[16] OJ L 336, December 29, 1999, p. 21.
[17] OJ C 291, October 13, 2000, p. 1.

users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods, effectively prohibiting the sale to another buyer that incorporates the components. This exception to the exemption could be interpreted as prohibiting certain types of procompetitive joint purchasing agreements. If two businesses wish to jointly purchase component parts, they often stipulate that the purchasing venture may sell such component parts exclusively to the businesses which undertake the joint purchasing, but not to third parties. However, under the "hard-core" restriction of Article 4(e) of the Vertical BER, it appears that the parties cannot agree on such a prohibition, unless they are prepared to lose the exemption otherwise provided by the Vertical BER. The Sections recommend that the Commission consider additional guidance addressing this point.

The Sections respectfully submit that the Commission consider, additionally, revising the Horizontal Guidelines to recognize that the conduct of parties to some purchasing agreements may be so integrated as to make evaluation under the Vertical BER and Vertical Guidelines inappropriate. In some cases, joint purchasing is accomplished through an integration of business functions (and/or structures). If the venture were a true economic integration, it may be appropriate to view the relationship between the venture and its members as similar to the relationship between a parent corporation and its subsidiaries. In that situation, antitrust rules for vertical relationships between independent entities may not apply.[18] Such an approach would give more freedom to the members to organize and operate the joint purchasing venture in a manner that enhances its procompetitive benefits.

C. Relevant Markets

In Part 4.2 of the Horizontal Guidelines, the Commission identifies two markets that may be affected by joint purchasing, *i.e.*, the purchasing market and the selling market.

[18] See, *e.g.*, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

However, in its final report on its sector inquiry on business insurance, the Commission noted that horizontal cooperation among insurers had generated some comments concerning competitive effects in downstream markets in which the cooperating firms did not participate, *i.e.*, security devices.[19] The results of the business insurance sector inquiry suggest that there is the possibility that horizontal cooperative buying agreements may have effects beyond the markets in which the participants are active. The Horizontal Guidelines could be enhanced by an expression of the Commission's view on the need for analyzing such effects, whether in the context of joint purchasing agreements or otherwise.

IV. Commercialization Agreements

The Sections have not identified any major problems in application of the chapter of the Horizontal Guidelines that addresses commercialization agreements (¶¶ 139-55). In focusing on the market impact of commercialization agreements not involving price fixing, the Horizontal Guidelines follow the same general approach as the Antitrust Guidelines for Collaborations among Competitors issued in April 2000 by the Federal Trade Commission and the U. S. Department of Justice ("U.S. Horizontal Guidelines"). The U.S. Horizontal Guidelines note the potential benefits of competitor agreements jointly to sell, distribute or promote goods,[20] but they also note that such agreements can facilitate collusion on price and output or the exchange of competitively sensitive information.[21] The Horizontal Guidelines recognize the same concerns (¶¶ 2, 3 19, 20, 146).

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[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Business Insurance (Final Report) COM/2007/0556 final, September 25, 2007, para. 28.

[20] U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,161.

[21] *Id.* § 3.31(b).

Assessment under Article 81(3) EC focuses on efficiencies resulting from integration of economic activities (¶¶ 151-52), and commercialization agreements are analyzed under the Horizontal Guidelines by taking into account the same considerations important in analyzing marketing joint ventures under U.S. antitrust law, *e.g.*, whether the competitor collaboration yields efficiencies that could not be achieved, or would be more costly or take longer to achieve if pursued, by the parties acting independently.[22]

Paragraph 146 of the Horizontal Guidelines identifies the opportunity for exchange of sensitive commercial information, such as marketing strategy and pricing, as a concern in commercialization agreements that fall short of joint selling, and it is submitted that the Horizontal Guidelines should be revised specifically to address information exchanges between or among competitors. This shortcoming is discussed in detail at pages __ below.

It would also be helpful to include reference in the Horizontal Guidelines to the Commission's formulation of the ancillary restraint doctrine. Evaluation of commercialization agreements routinely entails consideration of whether the restraints under review are justifiable as reasonable ancillary restraints.[23] In their current form, the Horizontal Guidelines explicitly address the need to consult the Vertical BER and the Vertical Guidelines in evaluating commercialization agreements (Horizontal Guidelines, ¶ 140), and they should,

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[22] See, *e.g.*, In re *ATM Fee Antitrust Litig.*, 554 F. Supp.2d 1003, 1016 (N.D. Cal. 2008) (interchange fee charged by member banks of ATM network should be evaluated under rule of reason since it was ancillary to joint venture "responsible for creating significant and beneficial efficiencies that could not otherwise be accomplished"); *Polygram Holding*, 136 F.T.C. 310, 358-69 (2003) (price and advertising restraints by members of joint venture for distribution of new product violated antitrust laws because the resulting efficiencies were not related to the purpose of the joint venture), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). See generally ABA SECTION OF ANTITRUST LAW, JOINT VENTURES: ANTITRUST ANALYSIS OF COLLABORATIONS AMONG COMPETITORS 10-11 (2006) (collecting cases on marketing and distribution joint ventures).

[23] See, *e.g.*, *In re ATM Fee Antitrust Litig.*, 554 F. Supp.2d at 1014-16 (interchange fee found to be reasonably ancillary to banking joint venture creating ATM network); *Polygram Holding*, 136 F.T.C. at 366-69 (price and advertising restraints on products sold outside of joint venture held not to be reasonably ancillary to joint venture). The Commission recognized in its Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty, OJ C 101, April 27, 2004, p. 97 ("Guidelines on Article 81(3) EC"), ¶ 31, that there may be instances in which restraints incident to a joint venture may be justifiable, and therefore outside of Article 81(1), as ancillary restraints.

similarly, refer to the discussion of ancillary restraints at ¶¶ 28-31 in the Guidelines on Article 81(3) EC or, alternatively, incorporate in the Horizontal Guidelines a full discussion of the ancillary restraints doctrine.

V. Agreements On Standards

The clear benefits of standard-setting have led the Commission and European Courts to adopt a generally favorable view of standards under Community law. Consistent with this, the existing treatment of standardization agreements in the Horizontal Guidelines (¶¶ 159-75) sets out a positive framework for standard-setting in the context of formal standard-setting bodies. The Horizontal Guidelines, however, are silent in relation to standard-setting issues outside such formal bodies and do not consider the roles played by many standard-setting participants as both providers and users of standardized technology. As a result, the Horizontal Guidelines do not specifically address the interface between intellectual property rights and standard-setting (particularly the issue of whether, and under what conditions, a standard-setting body may require disclosure of intellectual property rights and licensing terms before setting the terms for the relevant standard).

A. The Application of Article 81(1) EC To Standard-Setting Agreements

In their present form, the Horizontal Guidelines set out a three-step test to determine whether standardization agreements that "grant the parties joint control over production and / or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or producers of the standardised products" (¶166) are restrictive of competition, namely

- The agreement grants joint control to the parties over production and / innovation;

- The agreement restricts the ability of the parties to compete on product characteristics; and
- The agreement affects third parties (particularly through discrimination, foreclosure or geographic market sharing) (*id.*).

Beyond the standardization agreement itself, restrictive provisions may be caught by Article 81(1) EC if they "go beyond the primary object of standardisation" (¶ 167). The Horizontal Guidelines focus on restrictions that limit the ability of the parties "to develop alternative standards or products that do not comply with the agreed standards" (*id.*). They also expressly identify agreements granting exclusive rights to one or more testing bodies to assess compliance with the standard and restrictions on conformity markings as provisions that may fall within Article 81(1) EC (*id.*).

Beyond this basic framework, the Horizontal Guidelines provide limited guidance as to the circumstances in which standard-setting can lead to competitive harm. While it may not be appropriate to attempt to provide a comprehensive view of the circumstances in which standard-setting agreement (and related restrictive provisions) can fall within Article 81(1) EC, it would be useful if the Horizontal Guidelines provided greater guidance.

First, the Commission could consider including a brief paragraph in this chapter of the Horizontal Guidelines emphasizing that the focus in applying Article 81 EC to standard-setting agreements falls on consumer welfare considerations. While Article 81 EC provides a basis for analyzing disputes between stakeholders over competing claims to the profits of innovation, this chapter should address potential benefits from the rents attributable to an innovation, such as access to technology, lower downstream prices and the like, while also taking into account its effects on price and output for consumers and the incentives for future innovation

Second, the Sections recommend that the Commission include in the introduction to this chapter of the Horizontal Guidelines a brief discussion of the competitive harm that may result from standard-setting activities, namely:

- Possible competitive harm in the markets for the products produced in accordance with the standard, primarily through facilitation of collusion (*e.g.*, increased transparency can make price comparison easier or can lead to greater concentration resulting from the exclusion of existing or potential competitors if they cannot access the standard);
- Possible competitive harm in the technology market itself, *i.e.*, foreclosure of other optimal technologies from the market and inhibition of development for those excluded technologies; such consumer harm can occur if there are genuine alternative technologies and if the industry commitment to the standard renders other technologies unviable; and
- Possible competitive harm to innovation or dynamic competition in the event the standard-setting members disproportionately represent customers of an intellectual property that is provided to the standard, and requirements and concerted discussions over prices and terms rather than on technological merit; this would in turn harm the incentives for further innovation, and lessen dynamic competition in the long run.

B. The Application Of Article 81(3) EC To Standard-Setting Agreements

The Horizontal Guidelines provide at ¶¶ 169-75 an analytical framework for providing conditions for certain standard-setting agreements that fall under Article 81(1) EC, which would be permissible if meeting the conditions under Article 81(3) EC. The Sections believe that the Commission should consider certain suggestions as described below.

First, in the context of identifying economic benefits, ¶ 169 suggests that the necessary information to apply the standard must be available to those wishing to enter the market and that an appreciable proportion of the industry must be involved in the standard setting in a transparent manner It is not clear how third party access is a necessary precondition for benefits (as distinct from having an impact on the extent of benefits), and clarification would be helpful. In making this suggestion, the Sections recognize that it is not an easy task to provide additional guidance, given that standard setting is voluntary.

Second, ¶ 170 provides that the parties may have to demonstrate that collective standardization is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective benefits. It will often be difficult, if not impossible, for parties to determine the pace at which a new standard will cause existing products to become obsolete (let alone to determine whether this is "unduly rapid"). It is also unclear what is contemplated by the possibility that "objective additional benefits" could redeem arrangements that would otherwise risk triggering unduly rapid obsolescence of existing products. The Sections are concerned that the Guidelines may provide disincentives for technological development, if it makes a recently adopted standard obsolete quickly. For such a standard to be obsolete, it would mean that the appropriate standards body has consensus to adopt a new technology, and in such a case, there should not be a competition law concern with that evolution.

Third, in relation to "indispensability," ¶ 171 focuses on whether standards are "neutral," the desirability that standards be set on a nondiscriminatory basis and the justification of the choice of one technology over others as the basis for the standard. However, it does not identify the restriction being assessed for indispensability. Rather, it appears that the Horizontal Guidelines view the setting of the standard itself (rather than the

inclusion of a restrictive provision) to be potentially restrictive. This unusual (and apparently unprecedented) application of Article 81 EC should be reconsidered by the Commission.

While broad participation, transparency in decision-making and industry access may reduce likely competitive harm and increase economic benefit, the Sections believe that the legal basis under Article 81(3) EC for such conditions stems from the possible fact that, in their absence, economic benefits of the standard-setting arrangement may not outweigh the potential competitive harm rather than from either the "indispensability" or the "no elimination of competition" requirements of Article 81(3) EC.

C. Standard-Setting And IP Rights

There are two key areas of intersection between standard-setting and intellectual property licensing, namely:

- Policies that encourage disclosure of the existence of IP rights related to implementation of the standard, efforts to consider requiring the disclosure of the terms on which rights are licensed under the standard; and
- The requirement that standard-setting participants make essential IP rights required to implement standards available on fair, reasonable and nondiscriminatory ("FRND") terms.

Where Article 81 EC applies to certain types of standard-setting agreement, third parties must have access to the standard under certain FRND terms. Where application of the standard would infringe IP rights of industry participants in the development of the standard, the Commission requires that access be provided through licensing on FRND terms.. However, while the FRND concept has been used by the Commission since the 1970s, there is limited guidance as to its meaning. With much discussions and disagreements relating to this debate, various tests have been proposed, including, for example: the so-called *Georgia-*

Pacific factors, numeric proportionality, ECPR and the Shapley value. Other proposed tests include variants, such as the Swanson and Baumol (ECPR-derived) framework. It would be helpful to gain greater knowledge of the effects of these tests on innovation policy and the proper balance of incentives for investment in research and development by firms, and as such the Commission should examine this area more before providing guidance that would limit the freedom of parties to license, or not to license, intellectual property rights.

Aside from the FRND obligation that would apply to essential IP rights in certain events as under ¶ 175, some standards organizations and participants have suggested in some cases a desire to impose other requirements, such as *ex ante* requirements to disclose pricing terms, which may themselves be restrictive of competition. Greater guidance is needed to ensure that participants' proposals not amount to a group boycott of purchases of intellectual property rights in order to collectively lower prices of inputs, and not a sham to overcome an alleged fraud on the standards body to engage in a so-called "patent ambush," *i.e.*, the subsequent assertion of previously undisclosed essential IP rights.

Consistent with the cautions in the previous section, it is important to evaluate the possible competitive harm to innovation or dynamic competition in the event the standard-setting members disproportionately represent customers of the intellectual property that is provided to the standard. For example, if customers of a particular intellectual property that is needed for a technology standard demand a sub-competitive price, and have the market power by virtue of their collective voice on the standard-setting body, they would have a monopsonic effect on the price for the intellectual property realized by the innovator who is providing an essential intellectual property right for the standard. This would in turn harm the incentives for further innovation, and lessen dynamic competition in the long run. The effect would be similar to a group-boycott, with consumer welfare being disadvantaged for a potential lower input price in the short-term. The Commission may wish to consider clearer

guidance as to when Article 81 EC would preclude concerted price-setting policies for intellectual property.

D. Standards Agreements Block Exemption

The Sections note that the Commission has a mandate to issue a block exemption regulation concerning the application of standards. To increase legal certainty, the Sections would recommend that the Commission consider adopting such a block exemption regulation, based on the principles currently set forth in the Horizontal Guidelines (subject to the revisions developed through the current review process). Alternatively, the Commission may consider adopting one or more broader block exemptions concerning horizontal cooperation agreements into which it could incorporating such guidance for standards.

VI. Environmental Agreements

Environmental issues are becoming increasingly prominent as governments, industry and consumers grapple with the challenges presented by climate change. The Sections appreciate the Commission for being an early mover in acknowledging the importance of competition law in this process. They respectfully suggest, however, that "environmental agreements" as such is not appropriate analytical category for the application of competition law.

Unlike the types of agreements discussed in sections two through six of the Horizontal Guidelines, which are defined by their economic function, the agreements discussed in section seven are defined by their social objective. The potential restriction of competition must still be analyzed with respect to the economic function of the agreement, a fact that the Horizontal Guidelines implicitly acknowledge through their exclusion of vertical agreements from the "environmental agreements" section of the Horizontal Guidelines. Thus,

the only function of this section appears to be the application of Article 81(3) EC to agreements with an environmental objective.

The Sections submit that the discussion of economic benefits in this section of the Horizontal Guidelines is too cursory to be useful in practice. In particular, the criteria discussed in section 7.4.1 of the Horizontal Guidelines are vague. For example, section 7.4.1 does not provide standards for measuring "net benefits in terms of reduced environmental pressure" (¶ 193) or the "positive rate of return" to consumers (¶ 194) from environmental agreements. This section provides no guidance for how to weigh such a "net benefit" or "positive rate of return," if it could be measured against the harm such agreement might cause to the competitive process. For example, how many tons of CO_2 reductions are necessary to justify a 10% price increase to consumers? What if a practice reduces CO_2 emissions, but increases NO_2 emissions?

On a more general note, the Sections question whether it is the role of competition authorities to conduct this cost-benefit analysis. Competition authorities have expertise in estimating the harm caused by an exercise of market power. They are not, however, competent agencies for weighing this loss against the less quantifiable gains from reductions in emissions or energy consumption, except insofar as such reductions also reduce the costs of the business in question or its customers. By engaging in such an analysis, competition authorities replace the market's judgment with their own, creating winners and losers in the process.[24] We suggest that where some groups will be made worse off by a practice, the choice should be left to the legislator, not the competition authority.

[24] For instance, the example at ¶ 178 of the Horizontal Guidelines posits that although the restriction in question results in higher purchasing prices, customers will benefit in the long run from the lower running costs. No explanation is given for why consumers are unable to evaluate for themselves the long-run cost of appliance ownership. By taking the choice away from consumers, it is likely that some low-income customers may not be able to afford the initial outlay, and will ultimately be worse off as a result of the agreement.

VII. Agreements On Information Exchange

A. The Case For EC Guidance

The Sections respectfully submit that economic literature consistently supports the view that the mere sharing of information is generally competitively beneficial, or at worse, competitively neutral. Firms, if better informed on the state of market conditions or on competitors' initiatives, may improve the quality of their decisions (*e.g.*, benchmarking conduct against industry best practices, improving stock control, sales force training and technology development).[25] Conversely, given certain conditions (typically in oligopolistic markets), "pure" exchanges of information can increase the potential for sustaining tacit collusion, where knowledge obtained through the sharing of information leads to market equilibria at levels different to those that would have prevailed but for the exchanges. The ultimate resolution of this inherent tension between such conflicting theoretical outcomes largely depends the underlying facts of each case.

The Sections recognize that the Commission has been appropriately cautious in addressing information exchanges to avoid distortion of the market. As the Commission stated, "*[i]t is difficult to establish general rules to distinguish between information exchanges that are neutral or even pro-competitive from those that are restrictive of competition*"[26]. Nonetheless, a number of factors suggest that Commission Guidance on this topic would be beneficial.

[25] See R. Whish, Information agreements, in The Pros and Cons of Information Sharing, Konkurrensverket-Swedish Competition Authority, 19 (2006).

[26] European Commission, Information Note - Issues raised in discussions with the carrier industry in relation to the Commission guidelines on the application of competition rules to maritime transport services, at para. 17.

First, the seminal statements embedded in the 1978 Seventh Report on Competition Policy[27] on the treatment of "pure" exchanges of information under Article 81 EC date back some 30 years. While the recent Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (the "Maritime Guidelines")[28] provide guidance for the maritime sector, the Commission may wish to clarify – for avoidance of doubt – whether the principles that they set out apply to other sectors; and whether the existing non-sector-specific guidance has been superseded.

Second, the Maritime Guidelines themselves would benefit from clarification. For example, they are ambiguous as to the treatment of the exchange of public information. As a general rule, the exchange of public information should not affect the independent market behavior of firms since the data – being public in nature - are available otherwise. In this context, the Maritime Guidelines, while generally embodying this principle through reference to the *TACA* decision by the CFI,[29] created ambiguity through their statement that it would be "*important to establish the level of transparency of the market and whether the exchange enhances information by making it more accessible and/or combines publicly available information with other information. The resulting information may become commercially sensitive and its exchange potentially restrictive of competition*" (Maritime Guidelines, ¶ 51). The reference in the Maritime Guidelines to potential infringement where exchanged information is public but made "more accessible" creates ambiguity. As a matter of fact, almost any shared collection of data makes the acquisition of the relevant information more efficient (and thus, technically, "more accessible"). That, in and of itself, cannot lead to the

[27] Commission, Seventh Report on Competition Policy, 1987, paras. 5 to 8.

[28] SEC(2008) 2151 final, July 1, 2008.

[29] Atlantic Container Line AB and Others v. Comm'n, Joined Cases T-191/98, T-212/98 to T-214/98, 2003 ECR II 3275 (CFI): "*The exchange of information already in the public domain does not in principle constitute an infringement of Article 81(1) of the Treaty*".

conclusion that the exchange of public information infringes Article 81 EC because it would override the decision in *TACA*.

Third, technological advances (in collecting, processing and distributing) information databases have also led to material change in the frequency with which such data is distributed, and the "age" of the data when provided. Far from being annual distributions, as *UK Tractor's* contemplated, some such services are daily (*i.e.*, information is available within 24 hours of a transaction occurring) or at least weekly. As a result, information relating to transactions may well be available to competitors before the products have been delivered or services performed. The effect is, accordingly, to both increase the frequency of information exchange and to supply essentially current (rather than historic) data.

Fourth, National Competition Authorities ("NCAs") have become more active with regard to information exchanges and additional guidance might help prevent divergence in enforcement standards, which may have sometimes produced inconsistent outcomes. Commission cases focus on whether the exchange of information is likely to have an anticompetitive effect. In *UK Tractors*[30], for example, the Commission considered that the agreement to exchange information through AEA/SIL was contrary to Article 81(1) EC because of its likely anticompetitive effects,[31] having concluded that the information exchange did not have an anti-competitive object.[32] A number of recent NCA decisions suggest some inconsistency in the application of such an effects-based test, particularly in the context of "potential effects".[33]

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[30] UK Agricultural Tractor Registration Exchange, OJ 1992 L 68, p. 19.

[31] John Deere Ltd v. Comm'n, T-35/92, 1994 ECR II 957 (CFI), at para. 92.

[32] Opinion of the Advocate General Ruiz-Jarabo Colomer, New Holland Ford Ltd v. Comm'n, Case C-8/95 P, 1998 ECR I 3175 (CJ), at para. 42: "*In the present case, the information exchange agreement did not have an anti-competitive object and, therefore, it was necessary to consider its effects on competition in the United Kingdom agricultural tractor market.*"

[33] See, *e.g.*, décision No. 05-D-64 of Nov. 25, 2005, where the Conseil de la Concurrence took the view that: "*The exchange of information between the Palaces … translates into a convergence of the evolutions*

The Sections respectfully submit that the Commission's revision of the Rules provides an appropriate opportunity for the Commission to provide helpful guidance as to the compatibility of information exchanges with Article 81 EC. The Sections encourage the Commission to take the opportunity presented by the present review of the Rules to seek comments from industry and other interested persons and then, if appropriate, to issue guidance.

CONCLUSION

The Sections commend DG Competition for undertaking a review of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules. We are grateful for the opportunity to provide the Sections' views on possible revisions to the Rules and hope that our comments are useful.

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of the average prices in the oligopoly. The Bristol [hotel] contests this convergence …. It is not here the venue for demonstrating a price convergence as a result of an agreement between the Palaces or a common plan mutually implemented. As already said …, what is required in terms of the anticompetitive effect is solely that there is an artificial increase of the transparency of the market to the benefit of the members of the oligopoly so as to allow them to adapt their respective strategies." Similarly, in *Iama*, the Italian *Autorità Garante della Concorrenza e del Mercato* concluded that a "pure" information exchange scheme was *per se* anticompetitive and no inquiry as to the effects on competition was thus required Ruling No 13622 of Sept. 30, 2004, in Bulletin 40/2004. A similar *per se* approach seems to have been taken by the the *Spanish Tribunal for the Protection of Competition* considered in *Fedicine*; see decision of May 10, 2006, in case No 588/05 *Distribuidores Cine*, Madrid (Tribunal de Defensa de la Competencia).